Supreme Court, U. S.
FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 77-25

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALVIN ALTMAN
Attorney for Petitioners
Flagg Brothers, Inc. and
Henry Flagg
888 Seventh Avenue
New York, New York 10019
(212) 245-7700

ALVIN ALTMAN
MICHAEL J. BARNAS
BRODSKY, LINETT, ALTMAN & SCHECHTER
Of Counsel

10840 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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In The

Supreme Court of the United States

October Term, 1976

No.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, FLAGG BROTHERS, INC., and HENRY FLAGG, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which reversed an order of the District Court in their favor dismissing, for lack of "state action", plaintiffs' complaint challenging Sections 7-209 and 7-210 of the New York Uniform Commercial Code as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and which remanded the cause to the District

Court for class-action determination and to determine the constitutionality of Section 7-210(2) authorizing enforcement by extrajudicial sale of a warehouseman's lien upon stored household goods after default in payment of his charges.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is set forth in full in the Appendix beginning at 3a. The opinion of the District Court for the Southern District of New York is reported at 404 F. Supp. 1059 (S.D.N.Y. 1975) and is set forth in full in the Appendix beginning at 31a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on April 7, 1977, and a copy thereof is set forth in the Appendix at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Is the "state action" requisite under the Fourteenth Amendment Due Process Clause and under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, prohibiting deprivation of a federally protected right while acting "under color of" state law, present in the enforcement of a lien by a warehouseman after default in payment of storage charges as provided under New York Uniform Commercial Code Section 7-210(2)?

II. Is a New York warehouseman's right of lien sale under the Uniform Commercial Code in satisfaction of delinquent storage charges an exercise of power traditionally associated with sovereignty which has been delegated to the warehouseman by the state so as to bring the sale within the purview of the Fourteenth Amendment as the action of the state?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appended to the Petition beginning at 48a of the Appendix are the following relevant constitutional provisions and statutes: Amendment XIV, Section 1, to the United States Constitution (in part); Section 7-210, Subd. (2) of the New York Uniform Commercial Code; Section 1 of the 1871 Civil Rights Act, 42 U.S.C. §1983, and its Federal jurisdictional counterpart, 28 U.S.C. §1343(3).

STATEMENT OF THE CASE

This case involves the constitutionality of a warehouseman's right to enforce his lien for default in payment of his charges in conformity with §7-210(2) of the New York Uniform Commercial Code. This Code provision is substantially the same in 49 states and in the District of Columbia.

Petitioners are the defendant household warehouseman corporation and its president individually. Respondents SHIRLEY HERRIOTT BROOKS and GLORIA JONES are former bailors of the stored household goods. Four associations of commercial warehousemen and the Attorney General of the State of New York were permitted to intervene in the action by the District Court as parties defendant. These intervenors, having not joined in this petition, are designated as respondents in this Court pursuant to Sup. Ct. R. 21, Subd. 4.

The household goods of respondents were picked up by, and stored with, petitioner warehouseman in separate transactions following court evictions from each respondent's apartment. In the course of the storage service, respondents failed to pay the charges thereby incurred and the warehouseman threatened to sell the contents at public auction as permitted by N.Y.C.C.C. §7-210(2). No sale took place in either case.

On September 21, 1973 respondent BROOKS commenced this action as a class action in the United States District Court for New York's Southern District. Federal jurisdiction was invoked under the Civil Rights Act of 1871, 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343(3). Respondent Jones intervened in the action, by permission of the District Court. Both respondents sought compensatory damages, permanent injunctive relief and a declaration of unconstitutionality under 28 U.S.C. §§2201 and 2202. The propriety of the class action was never certified under Fed. R. Civ. P. 23(c), although petitioners originally stipulated thereto. The five intervening defendants did not so stipulate at any time.

By decision and order entered July 7, 1975, the District Court denied respondents' motion for summary judgment and granted petitioners' cross-motion to dismiss the complaint for lack of Federal jurisdiction and for failure to state a claim upon which relief could be granted, upon the ground that the requisite "state action" necessary to sustain a claim under 42 U.S.C. §1983 and 28 U.S.C. §1343(3) is absent in the case of the sale of warehoused goods pursuant to the Uniform Commercial Code. The respondents appealed.

By a 2-1 vote, the Court of Appeals for the Second Circuit reversed the District Court's dismissal. The majority found that the statutory origin of the right of extrajudicial sale and its public function character combined to thrust the sale over the state action threshold. The dissent agreed with the District Court that the enforcement of a warehouseman's lien was never a public function and that the requisite significant degree of state involvement, the state all but compelling the challenged activity, is not present in the case of a warehouseman's lien sale.

The Court of Appeals remanded the action to the District Court for class-action determination and for further proceedings on the issue of whether the Uniform Commercial Code's statutory scheme comports with due process.

The technical nonfinality of the Court of Appeals judgment is not a bar to petitioners' request for review. 28 U.S.C. §1254(1) gives the Supreme Court certiorari jurisdiction over circuit courts to review interlocutory decisions, even ones denying a motion to dismiss the complaint. *Land v. Dollar,* 330 U.S. 731 (1974); *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); R. Stern and E. Gressman, *Supreme Court Practice,* (4th Ed. 1969), §§2.1, 2.2 and 4.19, pp. 26-27, 180-182. The lack of finality is not a bar to Supreme Court review so long as the Court of Appeals' ruling "is fundamental to the further conduct of the case." *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1944); *Land v. Dollar, supra,* 330 U.S. at n.2, *Gillespie v. U.S. Steel Corp.,* 379 U.S. 149, 153 (1964).

Prior to oral argument in the Court of Appeals the petitioner warehouseman's claims for storage charges were settled and the stored goods were returned to respondents (Appendix, 11a, 12a).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals is in diametrical conflict with the decision of the United States Court of Appeals for the Ninth Circuit on the same matter.

On August 2, 1976, while respondents' appeal of the District Court's dismissal to the Second Circuit Court of Appeals was under advisement, the United States Court of Appeals for the Ninth Circuit rendered its unanimous decision in *Melara v. Kennedy,* 541 F.2d 802, *reh. and reh. en banc denied* (Oct. 8, 1976), holding that the extrajudicial sale of stored household goods to enforce a warehouseman's lien under California Commercial Code §7210, virtually identical to N.Y.U.C.C. §7-210(2), does not constitute "state action" within the meaning of the Fourteenth Amendment and of Section 1 of the Federal

Civil Rights Act of 1871, 42 U.S.C. §1983. No appeal has been taken from this decision.

In *Melara,* a household warehouseman upon default in payment of its storage charges noticed a date for sale of the stored goods in satisfaction of the delinquent charges pursuant to California Commercial Code §7210(2). The goods' owner thereupon filed suit in the Federal District Court seeking pecuniary and declaratory relief under 42 U.S.C. §1983, upon the ground that the proposed extrajudicial sale violated his due process rights. The Federal District Court for the Northern District of California dismissed the complaint for failure to state a claim, holding that the threatened sale did not constitute "state action". *Melara v. Kennedy,* Civ. No. C-74-1535 ACW (N.D. Cal. 1974).

In affirming the District Court dismissal, the Ninth Circuit reached a conclusion diametrically opposed to the Second Circuit's decision finding state action present in a warehouseman's lien sale. The Second Circuit rests its decision on two grounds: the historical fact that the warehouseman's right of sale is a creation of statute, not existing at common law; and its opinion that the lien sale represents the exercise of a traditional public function, that of finally resolving disputes over storage charges, which has been delegated to the warehouseman by the State. The Ninth Circuit, citing the same Supreme Court precedents calling for a careful "sifting and weighing" analysis of the state action issue, *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961), rejects both grounds, dismissing the statutory origin test as "a factor of dubious worth", *Melara v. Kennedy, supra,* 541 F.2d at 805, and finding no public function in the lien sale, in that the State never has had to conduct forced sales of warehoused household goods, also in that the sale is not comparable to the judgment-levying function of a sheriff.

The Second Circuit itself recognizes the conflict between the two circuits, stating in its opinion below:

> "We recognize that our holding that the enforcement of the warehouseman's lien pursuant to §7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in Melara v. Kennedy, *supra.* We have given that case due consideration but we disagree with its conclusion and are unpersuaded by its analysis." (Appendix, *infra,* at 25a).

The direct conflict between the Second and Ninth Circuits on whether state action is present in a warehouseman's lien sale is further complicated by a recent decision in the Eighth Circuit. In *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.,* 45 U.S.L.W. 2575 (8th Cir. May 12, 1977), *reh. denied* (June 9, 1977), the Eighth Circuit found "state action" present in a lien sale by a warehouseman acting under North Dakota Commercial Code §7-210, N.D. Cent. Code §41-07-16. Mr. Justice Clark's opinion distinguishes *Melara v. Kennedy, supra,* pointing out that the North Dakota statute was enacted in 1967 whereas the California statute goes back to 1872. Therefore, he held, in North Dakota the foreclosure of the warehouseman's lien traditionally has been a function of the sheriff, while in California foreclosure has been private conduct by the warehouseman acting under statute for approximately one hundred years.

The Eighth Circuit's reliance on the public-function theory of state action is in accord with the decision below of the Second Circuit and in direct conflict with the Ninth Circuit. The Eighth Circuit's application of the theory, however, based upon the age of the statute, would require an opposite result to that reached by the Second Circuit below. The foreclosure of a lien, based upon the Eighth Circuit's analysis, is not a traditional public function in New York since it has been private conduct by the warehouseman acting under statute for approximately one hundred years (Appendix, *infra,* at 19a).

II.

The decision of the court below determines an important question of "state action" arising under the Federal Constitution and civil rights laws, which has not been, but should be, settled by this Court.

The question of whether "state action" is present within the meaning of Section 1 of the Fourteenth Amendment, and under the Civil Rights Act, 42 U.S.C. 1983, is an important question of Federal constitutional and civil rights law. Since the *Civil Rights Cases,* 109 U.S. 3 (1883), it has been established that the Fourteenth Amendment applies solely to the actions of the state, and conversely, that private conduct, "however discriminatory or wrongful," is immune from its proscriptions, *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948). The threshold question in any legal action invoking the Fourteenth Amendment, therefore, is whether the conduct under scrutiny is state action. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza,* 391 U.S. 308 (1968); *Evans v. Newton,* 382 U.S. 296 (1968). A finding that the conduct in question is "private" in nature, and thus immune from the Fourteenth Amendment, ends the constitutional inquiry. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972); *Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 377 (1974). A converse finding that state involvement is present in the challenged activity may also be dispositive of the entire case if there is no substantial issue concerning abridgement of Fourteenth Amendment guarantees. *Peterson v. City of Greenville,* 373 U.S. 244 (1963); *Terry v. Adams,* 345 U.S. 461, *reh. denied,* 345 U.S. 1003 (1953). And, if the Fourteenth Amendment is used as a sword rather than a shield to vindicate deprivations of constitutional rights under the civil rights laws, "state action" goes beyond the threshold inquiry to become one of the key elements of recovery in the plaintiff's prima facie case. See 42 U.S.C. §1983; *Adickes v. S. H. Kress and Co.,* 398 U.S. 144, 150, 188-190 (1970) (Opinion of Court and Opinion of Brennan, J., concurring and dissenting).

The importance of the "state action" question is evidenced by the frequency with which it has been interposed as a defense to the many Fourteenth Amendment due process challenges maintained in recent years against various collection remedies of "self-help" creditors. The Court of Appeals below cites 13 cases in the circuit courts alone raising the issue in an economic due process context, including three cases decided by the Second Circuit itself: *Shirley v. State Nat'l Bank,* 493 F.2d 739, *cert. denied,* 419 U.S. 1009 (1974) (peaceful repossession; no state action); *Bond v. Dentzer,* 494 F.2d 302, *cert. denied,* 419 U.S. 837 (1974) (wage assignment; no state action); *Hernandez v. European Auto Collision, Inc.,* 487 F.2d 378 (1973) ("garageman's" lien; "state action" not expressly decided). In these cases whether a subsisting contract provided for the remedy, whether the remedy existed at common law or was created by statute, and whether the remedy could be characterized as a public function, factors given crucial weight by the Court of Appeals below, were taken into consideration, "to varying degrees and with varying results." (Appendix, *infra,* at 16a).

As the Court of Appeals below noted, the Supreme Court has never addressed the important "state action" issue in regard to creditors' summary remedies such as the warehouseman's right of sale being challenged in the instant case.* The Court's latest pronouncement on the state action issue, *Jackson v. Metropolitan Edison Co., supra,* holding that a utility company's unilateral termination of service to a household for nonpayment of bills did not constitute "state action", is as close

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* In its quartet of economic due process decisions, *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Fuentes v. Shevin,* 407 U.S. 67, *reh. denied,* 409 U.S. 902 (1972); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975), the Supreme Court was not called upon to make a threshold "state action" determination on the applicability of the Due Process Clause of the Fourteenth Amendment.

as the Court has come to deciding the questions squarely presented by the decision below. The Court in *Jackson* left these questions open, stating, at 419 U.S. 352-53:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

The Supreme Court should resolve these important questions of Federal law. They have been extensively litigated producing conflicting results and divergent theories of state action in relation to the Uniform Commercial Code. Thus, on the constitutionality of the warehouseman's lien laws, the present state of the law is such that statutory provisions authorizing summary sale of stored goods to satisfy unpaid charges are subject to being struck down in Federal court in one part of the country, as violative of due process, whereas elsewhere the identical provisions are considered to be beyond Fourteenth Amendment purview. The impact of this anomaly upon the public requires disposition of the state action questions presented in this petition by the United States Supreme Court.

CONCLUSION

The Second Circuit decision is in direct conflict with the Ninth Circuit decision in *Melara v. Kennedy*, on the same matter. It ought to be reviewed to resolve this conflict, which has been compounded by the Eighth Circuit's decision in *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*

The Supreme Court has not considered the state action question in cases involving due process challenges to summary creditors' remedies provided under the Uniform Commercial Code and other creditor-debtor laws of the several states. In light of the many lower Federal courts that have considered the question, with varying results, this important question of Federal law should be settled by the highest Court.

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

s/ Alvin Altman

Attorney for Petitioners
Flagg Brothers, Inc. and
Henry Flagg

Alvin Altman
Michael J. Barnas
Brodsky, Linett, Altman & Schecter
Of Counsel

APPENDIX

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. JAMES S. HOLDEN

HON. FREDERICK vanPELT BRYAN
District Judges

Shirley Herriot Brooks, Gloria Jones, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

Flagg Brothers, Inc., individually and as representatives of a class of all others similarly situated, Henry Flagg, individually and as President of Flagg Brothers, Inc., The American Warehousemen's Association of the International Association of Refrigerated Warehouses, Inc., The Warehousemen's Association of New York and New Jersey, Inc., and The Cold Storage Warehousemen's Association of the Port of New York,

Defendants-Appellees.

Judgment of the Court of Appeals

75-7437

Filed
Apr. 7, 1977
A. Daniel Fusaro, Clerk

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

s/ Arthur Heller
Arthur Heller
Deputy Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 523—September Term, 1975.

(Argued February 13, 1976 Decided April 7, 1977.)

Docket No. 75-7437

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

Before:

TIMBERS, *Circuit Judge,* and
HOLDEN* and BRYAN,** *District Judges.*

* James S. Holden, Chief Judge of the District of Vermont, sitting by designation.

** Frederick vP. Bryan, Senior District Judge of the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Henry F. Werker, *J.*, dismissing, for lack of state action, plaintiff's complaint challenging §§7-209 and 7-210 of the New York Uniform Commercial Code as violative of 42 U.S.C. §1983 and the due process clause of the fourteenth amendment to the United States Constitution.

Reversed and remanded.

MARTIN A. SCHWARTZ, Esq., White Plains, N.Y. (The Legal Aid Society of Westchester County, White Plains, N.Y., on the brief, Lawrence S. Kahn, Evelyn Isaac, of counsel), *for Plaintiffs-Appellants.*

ALVIN ALTMAN, Esq., New York, N.Y. (Brodsky, Linnett & Altman, New York, N.Y., on the brief, Michael Barnas, of counsel), *for Defendants-Appellees Flagg Brothers, Inc., and Henry Flagg.*

WILLIAM H. TOWLE, Esq., Chicago, Ill. (Burke, Kerwin & Towle, Chicago, Ill. and Werner & Weiss, P.C., New York, N.Y., on the brief, Norman Weiss, of counsel), *for Defendants-Appellees American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc.*

ARNOLD H. SHAW, Esq., New York, N.Y. (Jaffe, Shaw & Rosenberg, New York, N.Y., on the brief), *for Defendants-Appellees Warehousemen's Association of New York and New Jersey, Inc., and the Cold Storage Warehousemen's Association of the Port of New York.*

A. SETH GREENWALD, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, State of New York, and Samuel A. Hirshowitz, First Asst. Attorney General, of counsel), *for Defendant-Appellee Louis J. Lefkowitz, Attorney General of the State of New York.*

BRYAN, *Senior District Judge:*

New York Uniform Commercial Code §7-209 grants a warehouseman a lien upon goods in his possession for charges incurred in connection with storage, and permits him to retain the goods until such charges are satisfied. New York Uniform Commercial Code §7-210 gives the warehouseman the power to enforce his lien by selling the stored goods, after complying with specified procedures.[1]

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1 The full text of the statutes in question follows:

§ 7—209. Lien of Warehouseman

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no

This statute provides that notice of a prospective sale be given to the owner of the stored goods. It does not, however, contemplate any judicial determination of the amount owing prior to the sale of the goods in satisfaction of the warehouseman's charges.

charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Article on Secured Transactions (Article 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 7—503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

§ 7—210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

The question presented by this appeal is whether the warehouseman's enforcement of his lien in this manner constitutes action "under color of" state law within the meaning of 42 U.S.C. §1983 or state action under the

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against

fourteenth amendment.[2] We hold that it does, and therefore reverse the lower court's dismissal of the complaint and remand for a determination of whether the statutory scheme involved comports with due process.

I.

Since the case comes before us on the dismissal of the complaint, we accept the plaintiffs' allegations of fact as true. *See Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957).

The original plaintiff in this case, Shirley Herriott Brooks, was a resident of Mount Vernon. On June 13, 1973, pursuant to an order of eviction of the City Court of Mount Vernon, the city marshal removed Brooks and her possessions from her apartment. Brooks told the marshal that she wanted to call someone to store her furniture and other household goods. The marshal informed her that she could not do so and that the man with him, defendant Henry Flagg, president of defendant Flagg

whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

2 The "under color of" state law provision in §1983 is equivalent to the state action requirement of the fourteenth amendment. *Shirley* v. *State National Bank of Connecticut,* 493 F.2d 739, 741 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974), citing *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 152 n.7 (1970) and *United States* v. *Price,* 383 U.S. 787, 794-95 n.7 (1966).

Brothers, Inc., would store her furniture. Flagg told Brooks that she would have to pay $65 per month for the moving and storage of her furniture. Brooks replied that this sounded like a high price but, believing that she had no choice, authorized Flagg to proceed with the moving and storage of her furniture and household possessions.

As soon as her goods were loaded on Flagg's trucks, one of the moving men told Brooks that she would have to pay $178—$75 per month for storage, $75 for barreling and platforming, and $28 for fumigating. Brooks protested that the entire job was only to cost $65, but eventually handed over a check for $178.

On or about June 15, 1973, Brooks called Flagg Brothers to find out how long it would store her goods for the $178 payment. She was informed that she already owed an additional $156. On June 19, 1973, Brooks went to the Flagg Brothers office. She was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that Flagg Brothers regarded the $178 payment as a deposit and that there was a "balance due" of $156.[3] Brooks told Henry Flagg that the charges were unreasonable and that she could not pay them. He told her that on the first of July, 1973 she would owe an additional $75 for storage for the month of July. Brooks argued that her storage

3 We reject Flagg Brothers' assertion that Brooks agreed to sale upon default in payment by accepting, some six days after the initial storage, the "Combined Uniform Household Goods Bill of Lading and Freight Bill" which in minute print referred to sale by the warehouseman in the event of nonpayment of storage charges. *See Fuentes* v. *Shevin,* 407 U.S. 67, 94-96 (1972). We thus view the authorization of sale of stored goods by Flagg as arising solely from §7-210, specifically subsection (2) which governs enforcement of a warehouseman's lien on goods other than goods stored by a merchant in the course of his business, and not from any contractual provisions. This is undoubtedly the case with respect to plaintiff Jones, who alleges that she never authorized storage of her goods, *see infra* at 4. The court below adopted this analysis, at least in part.

payment on June 13, 1973 should run to July 13, 1973, but Flagg insisted that, since storage charges are computed on a "per month" basis, even if her goods had been stored on June 29, 1973 an additional $75 would still be due on July 1, 1973.

The dispute over storage charges continued. On August 25, 1973, Brooks received a letter from Flagg Brothers informing her that unless she paid her outstanding balance of $306 within 10 days, her furniture would go up for sale. This letter was accompanied by a "Final Notice" informing Brooks that, unless payment on her storage account were made, Flagg Brothers would advertise her goods for public auction.

On September 21, 1973, Brooks instituted this action on behalf of herself and a proposed class consisting of

> persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

Relying upon 42 U.S.C. §1983[4] and its jurisdictional counterpart, 28 U.S.C. §1343(3),[5] she sought injunctive and

4 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5 28 U.S.C. §1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .

declaratory relief and damages on the ground that the detention and threatened sale of her goods pursuant to New York Uniform Commercial Code §§7-209 and 7-210 violated the due process clause of the fourteenth amendment. Named as defendants were the Mount Vernon marshal,[6] Henry Flagg, and Flagg Brothers, Inc., individually and as representative of a proposed defendant class consisting of

> warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 [sic] without affording the owner of the goods a prior opportunity to be heard.

In accordance with an agreement between counsel, on January 24, 1974, subsequent to the filing of the complaint, Brooks was permitted to remove her possessions from Flagg Brothers' warehouse without paying the disputed storage charges. Then in February, 1974 counsel stipulated that the action, with the classes described substantially as above, was a proper plaintiff and defendant class action under Fed. R. Civ. P. 23 with respect to the claims for injunctive and declaratory relief. These stipulations, however, were never approved by then District Judge Gurfein, to whom the case was assigned.

On June 25, 1974, Judge Gurfein granted the motion of Gloria Jones to intervene as party plaintiff pursuant to Fed. R. Civ. P. 24. Jones' allegations were parallel to

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

6 The action was subsequently dismissed as to the marshal by agreement of the parties.

those of Brooks. She, too, had been evicted by the Mount Vernon marshal, who was accompanied by an employee of Flagg Brothers. Jones denies, however, that she ever authorized Flagg Brothers to store her goods "either by written or oral contract, or otherwise," and claims that she was never advised of the rate she would have to pay for the storage of her household belongings. At the time of her proposed intervention, Jones' goods were still being retained by Flagg Brothers, who informed her counsel that they had no present intention to sell the goods and would inform him well in advance if they did decide to sell them.[7]

By the same order that granted Jones' motion to intervene, Judge Gurfein permitted the Attorney General of the State of New York, the American Warehousemen's Association, the International Association of Refrigerated Warehouses, Inc., the Warehousemen's Association of the Port

7 It appears that after the district court rendered its decision of July 7, 1975 dismissing the complaint, *see infra* at 5, Mrs. Jones informed her counsel that she had paid Flagg $1,600 for the return of her goods; that she did not receive all of her goods back; that some of her goods were received in damaged condition; and that she did not make the $1,600 payment voluntarily but only because of alleged threats of sale and the twenty-month detention of the goods.

Thereafter, by letter dated December 15, 1976, while this appeal was *sub judice*, Jones' counsel informed the court pursuant to Fed. R. App. P. 43 that he had learned of her recent death.

It is well settled that a plaintiff's cause of action under 42 U.S.C. §1983 survives for the benefit of the estate if the applicable state law creates a right of survival. *Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961). *See also Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977) (§1983 claim survives plaintiff's death after suit was brought even though it would abate under applicable state law). Jones' claims for relief would survive under New York Estates, Powers and Trusts Law §§11-3.1, 3.2(b), and thus are not abated by her death for purposes of this suit. Accordingly, counsel for Jones requests that, in the event of reversal, the case be remanded to the district court with leave for substitution of her personal representative pursuant to Fed. R. Civ. P. 25(a).

of New York, Inc.,[8] and the Cold Storage Warehousemen's Association of the Port of New York to intervene as parties defendant. *Brooks* v. *Flagg Brothers, Inc.*, 63 F.R.D. 409 (S.D.N.Y. 1974). The Attorney General was allowed to intervene on consent. Judge Gurfein permitted the trade associations to intervene over the objection of plaintiffs' counsel. The associations claimed that their members were engaged in large scale warehousing on behalf of merchants and other commercial entities functioning in interstate commerce, and argued that their interests in upholding the constitutionality of §§7-209 and 7-210 would not be adequately represented by Flagg Brothers, whose business was the moving and storage of furniture and other household goods.

On August 26, 1974, plaintiffs moved for class certification as to both plaintiffs and defendants, and for summary judgment on the question of the constitutionality of §§7-209 and 7-210. On September 19, 1974, the Flagg defendants moved to dismiss the action for failure to state a claim upon which relief can be granted.

By decision and order dated July 7, 1975, Judge Werker, to whom the case had been reassigned, denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the complaint. Applying the analysis of *Jackson* v. *Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975),[9] Judge Werker concluded

8 The Warehousemen's Association of the Port of New York, Inc., subsequently amended its certificate of incorporation to change its name to "Warehousemen's Association of New York and New Jersey, Inc."

9 In *Jackson*, Judge Smith specified five factors that are "particularly important" to a determination of state action:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to

that in imposing and enforcing his lien pursuant to §§7-209 and 7-210, the warehouseman does not act "under color of" state law within the meaning of 42 U.S.C. §1983. He dismissed the action for failure to state a claim under 42 U.S.C. §1983 without passing upon the due process claims or the class certification questions. This appeal followed.

Appellants do not presently press their challenges to §7-209, which authorizes imposition of the warehouseman's lien and retention of stored goods until it is satisfied.[10] They do, however, contend that enforcement of the warehouseman's lien by sale pursuant to §7-210 constitutes state action because the statute (1) delegates to the warehouseman uniquely governmental power and (2) expands the remedies available to the warehouseman beyond those which he possessed at common law. On the present record, this question is properly before us for decision. *See Tedeschi* v. *Blackwood*, 410 F. Supp. 34, 38-41 (D. Conn. 1976) (three-judge court) and cases there cited. *See also Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 752-757 (1976).

II.

The state action inquiry is not an easy one. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Au-*

which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Each of these factors is material; no one factor is conclusive.

496 F.2d at 629.

10 However, they state that they wish to preserve this point for possible review by the Supreme Court.

thority, 365 U.S. 715, 722 (1961). The ultimate question to be resolved is "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

The first step in the resolution of this question is to identify correctly the particular kind of state action allegation with which the court is dealing. This is because standards for determining state action have been formulated in many different contexts, and the resulting formulations are not often interchangeable. For example, the criteria for finding state action in equal protection cases involving charges of racial discrimination are easier to meet than those formulated in cases such as that at bar. *See, e.g., Coleman* v. *Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, *J.* concurring); *Jackson* v. *Statler Foundation, supra*, at 628-29; *Girard* v. *94th St. and Fifth Ave. Corp.*, 530 F.2d 66, 69 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976). Similarly, tests for determining whether the state has become so entwined with a private entity—by financially supporting it, regulating it, or otherwise—as to make the actions of the private entity the state's own, are not of much help in resolving other types of state action problems.

In this case, Judge Werker used the factors enumerated in *Jackson* v. *Statler Foundation, supra*, at 629, *see supra* n.9, to determine whether state action was present. The *Jackson* factors, however, developed in a case where the appellant sought to characterize the allegedly racially discriminatory activities of certain private foundations as state action by virtue of the foundations' tax exempt status, are not particularly enlightening when applied to the factual situation at hand. The instant case involves a question of alleged delegation of distinctly governmental power,

which can best be resolved by reference to cases involving similar facts.

The Supreme Court has not yet squarely addressed the question of whether a delegation of state authority to creditors constitutes state action. Its only comment on the subject came in *Jackson* v. *Metropolitan Edison Co., supra,* where the Court rejected a claim that state action was present in a tariff-authorized termination of electric service by a privately owned and operated utility corporation holding a certificate of public convenience issued by the Pennsylvania Utility Commission. The Court there noted:

> If we were dealing with the exercise by [the power company] of some power delegated to it by the State which is traditionally associated with sovereignty . . . our case would be quite a different one.

419 U.S. at 352-53.

Several circuit courts, however, have decided the state action question in cases involving due process challenges to summary creditors' remedies similar to that presented here. These cases have focused on essentially the same factors (whether the state has delegated one of its unique powers to a private person; whether the common law rights of the creditor were expanded or merely codified; whether the creditor's power amounts to a roving commission or exists only over particular chattels that are closely connected with the debt; whether the creditor's remedy was authorized by contract as well as statute; whether the creditor's resort to the remedy was mandatory or optional; whether the state extensively regulates the creditor's industry; and even whether title rests in the debtor or creditor) to varying degrees and with varying results. *See Culbertson* v. *Leland,* 528 F.2d 426 (9th Cir. 1975) ("innkeeper's" lien; state action); *Hall* v. *Garson,* 430 F.2d

430 (5th Cir. 1970) ("innkeeper's" lien; state action); *Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975) ("innkeeper's" lien; no state action); *Anastasia* v. *Cosmopolitan National Bank of Chicago,* 527 F.2d 150 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976) ("innkeeper's" lien; no state action); *Philips* v. *Money,* 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975) ("garageman's" lien; no state action); *James* v. *Pinnix,* 495 F.2d 206 (5th Cir. 1974) (repossession; no state action); *Adams* v. *Southern California First National Bank,* 492 F.2d 324 (9th Cir.), *cert. denied,* 419 U.S. 1006 (1974) (repossession; no state action); *Fletcher* v. *Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir.), *cert. denied,* 419 U.S. 1001 (1974) (bank's right of set-off; no state action); *Melara* v. *Kennedy,* 541 F.2d 802 (9th Cir. 1976) (enforcement of warehouseman's lien under California Commercial Code §7210; no state action).

Appellants here specify only two factors which point to state action in the warehouseman's enforcement of his lien. We conclude, however, that the combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action.

New York Uniform Commercial Code §7-210 provides the warehouseman with a truly extraordinary remedy. After giving the bailor specified notice, *see supra* n. 1, the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally.

The Supreme Court has already shown its grave concern over even temporary deprivations of property without

prior judicial determination of the amount owing in a series of cases challenging various provisional remedies afforded creditors. *See Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin, supra; Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). These cases stand at least for the proposition that while judicial inquiry may at times be postponed, an adequate judicial determination of liability must take place before any deprivation of property if due process requirements are to be satisfied. The statutory scheme before us, in contrast, contemplates no judicial—or even impartial—determination of the amount owing before a final deprivation of property.

This would be quite beside the point if the state were not implicated in the warehouseman's enforcement of his lien. But by enacting §7-210, New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution, *see Shirley* v. *State National Bank of Connecticut, supra,* at 747 (Kaufman, *C.J.*, dissenting); *Bond* v. *Dentzer*, 494 F.2d 302, 312 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974) (Kaufman, *C.J.*, dissenting), but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff.[11]

11 *Blye* v. *Globe-Wernicke Realty Co.*, 347 N.Y.S.2d 170 (1973). There, in finding that an innkeeper's enforcement of his lien pursuant to New York Lien Law §181 involves state action and violates due process, the New York Court of Appeals stated:

> In this State, the execution of a lien, be it a conventional security interest (Lien Law, §207), a writ of attachment (CPLR art. 62), or a judgment lien (CPLR art. 52) traditionally has been the function of the Sheriff.

347 N.Y.S.2d at 175. *See* also *Sharrock* v. *Dell Buick-Cadillac, Inc.*, —— N.Y.S.2d —— (App. Div. 2d Dept., decided March 28, 1977).

We do not agree with Judge Werker's attempt to distinguish *Blye* on the ground that the liens referred to there all involve execution upon goods having no particular relationship to the debt owing. A "conventional security interest" would include the typical purchase money security interest where the debt and security are fundamentally related.

Moreover, we are reluctant to rely heavily in the state action inquiry upon whether the property executed upon is closely connected to the alleged debt or not connected at all. This consideration bears only upon the extent of the intrusion upon the debtor's property rights that the state has authorized, and not upon whether the state has in fact delegated some of its sovereign power.

This delegation expanded the warehouseman's remedies far beyond those existing at common law. There the warehouseman, in the absence of an express agreement authorizing sale upon default, could only retain the goods to coerce payment; he could not sell the goods and apply the proceeds to the debt. R. Brown, The Law of Personal Property §108, at 519, §119, at 588-89 (2d ed. 1955).[12] If mere detention of the goods failed to bring about payment, the warehouseman had to resort to the courts to obtain a judgment for the charges due and then deliver a writ of execution to the sheriff, who would sell the goods pursuant to the requirements of state law and deliver the proceeds to the warehouseman. *See* 62 N.Y. Jur. *Warehouse Receipts* §125, at 747, 747 n.2. Only in 1879[13] did the warehouseman for the first time become empowered to sell stored goods in satisfaction of delinquent charges.[14]

Appellees argue that the alteration of common law rights which took place is of little significance, citing the following passage from Burke and Reber, *State Action, Congres-*

12 *See also Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y. Sup. Ct. 1832); *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-45 (1900).

13 We note in passing that this was subsequent to the enactment of the fourteenth amendment.

14 *See* Ch. 336 [1879] N.Y. Laws 417. This statute underwent various amendments and reenactments, not here pertinent, before assuming its present form with the adoption of the Uniform Commercial Code in 1962. *See* Ch. 421, [1883] N.Y. Laws 592; Ch. 526, [1885] N.Y. Laws 891; Ch. 418, [1897] N.Y. Laws 514; Ch. 369, [1899] N.Y. Laws 793; Ch. 732, [1907] N.Y. Laws 1706; Ch. 588, [1949] N.Y. Laws 1339.

sional Power and Creditors' Rights: An Essay on the Fourteenth Amendment, 47 S. Cal. L. Rev. 1 (1973):

> The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law.

Id. at 47.

We of course agree that an alteration in the common law remedy alone is not dispositive of the state action inquiry. But we reject the authors' conclusion that statutes such as §7-210 have only a minor impact on "private ordering."

Were it not for this statute, the warehouseman would stand in the position of any other creditor, i.e., he would have to have the debt he claims he is owed judicially established, and then have the sheriff execute upon the goods which he concededly has the common law right to hold as security. The action of the state in granting the warehouseman the privileged position he enjoys under §7-210, even though long ago, drastically changes the balance of power between debtor and creditor. It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested

judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions. While we recognize generally the value of preserving a sphere for private activity free from the restrictions imposed upon the state by the fourteenth amendment,[15] it is plain that the state's conscious election to delegate a portion of its uniquely governmental power to the warehouseman in order to enhance his common law position as creditor constitutes state action.

The result we reach today accords with prior decisions of this circuit which conducted similar state action inquiries.

In *Shirley* v. *State National Bank of Connecticut, supra,* the plaintiff's automobile was peacefully repossessed by an assignee of the conditional seller, pursuant to a contractual provision. The plaintiff challenged the constitutionality of the Connecticut statute which authorizes such repossession if the sales contract expressly makes default a ground for retaking the property. In concluding that state action was not present, the court, with Chief Judge Kaufman dissenting, relied heavily on the fact that Connecticut creditors had a common law right to peaceful repossession without a hearing, and that the statutory enactment only increased protection of installment purchasers. Judge Mulligan reasoned that

> since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action. No delegation of traditional state power has been granted to any private person.

493 F.2d at 743.

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15 This value is nonexistent, however, when a private party wields power that belongs to the state and is subject to egregious abuse if not regulated.

In *Bond* v. *Dentzer, supra,* the same panel which decided *Shirley* faced a similar question: whether the unilateral filing of wage assignments by creditors with their debtors' employers, as authorized by the New York wage assignment statute and pursuant to specific loan agreements, constitutes state action. Once again the court, with Chief Judge Kaufman dissenting, found no state action, rejecting the plaintiffs' "partnership," "encouragement," and "traditional state functions" theories. The partnership argument fell because of the lack of state "entwinement" with the defendant finance companies. The other arguments failed because the state had "not deprived the plaintiffs of anything," 494 F.2d at 307:

> [T]he legislation does not vest the assignee with any function traditionally performed by the State. The function of the wage assignment has always been that of a private levy without a prior court order. There was never any requirement or practice which has been called to our attention which mandated the creditor to first establish the debt before attaching the wages and which the State has now abrogated. In fact, as our prior discussion indicates, the State has created a right on the part of the debtor to question the debt by initiating an action which was not known at common law. In sum, the statute has not given the assignee anything new; it has in fact circumscribed substantially the rights of the creditor which were untrammeled at common law.

494 F.2d at 311.

The distinctions between the facts of *Shirley* and *Bond* and those of the case at bar are manifest. In neither of those cases was there any expansion of common law creditors' remedies or delegation of power traditionally

exercised by the state—the precise factors which we deem determinative in the present state action inquiry.[16] *See also Tedeschi* v. *Blackwood, supra,* at 42 n.10.

In the most recent case on the subject in this circuit, *Tedeschi* v. *Blackwood, supra,* Judge Smith, writing for a three-judge district court in Connecticut, concluded that statutory provisions permitting the foreclosure by sale of a garageman's lien for towing and storage—analogous to §7-210—involved state action and violated due process.

The statutory scheme at issue in *Tedeschi* empowered a police officer or motor vehicle inspector who determined that a motor vehicle had been abandoned, unregistered, or dangerously parked to have the vehicle towed to a garage for storage. All towing and storage charges incurred became a lien on the vehicle which in time could be foreclosed by the garage through its sale of the vehicle. The statute did not, however, afford a right to a hearing to a person wishing to contest the application of either its towing or its lien provisions to his vehicle.

Judge Smith found state action present in the implementation of the towing provisions by virtue of a state agent's "meaningful participation" by initiating all such towings. He then ruled that state action was present in the creation of the garageman's lien because, rather than merely "acknowledging" the legality of private conduct, this statute "authorized" conduct which would otherwise be impermissible.[17] Finally, he concluded that

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16 A further distinguishing feature of both *Shirley* and *Bond* is that the courts there concluded that the creditors' remedies in question were specifically authorized by contracts underlying the debts. Contrast n.3, *supra.*

17 Judge Smith observed:

> While Connecticut common law may recognize the legality of a garage lien for services on a vehicle voluntarily surrendered for the performance of these services, it does not recognize such a lien where the garage has gained possession of the vehicle without the

> taken *by itself*, the foreclosure of a garagekeeper's lien pursuant to §14-150 to cover towing and storage charges also constitutes "state action," [18]

410 F. Supp. at 42 (emphasis added), and noted that in *Hernandez* v. *European Auto Collision*, 487 F.2d 378 (2d Cir. 1973), this court gave a strong indication that it would find such foreclosure or sale provisions unconstitutional.

The plaintiff in *Hernandez*, whose car was auctioned off by a garageman after he refused to pay for allegedly unauthorized repairs, challenged the pertinent sale provision of the New York Lien Law. Without expressly addressing the issue of state action, the court, in an opinion by Judge Wyzanski, ruled that, if the facts were as plaintiff claimed, he had a tenable contention that the lien law as applied violated the due process clause. It directed the district court to try the case on its merits. Judge Timbers, in a concurring opinion joined by Judge Lumbard, would have taken the further step of directing the district court to declare the sale provisions unconstitutional as applied if Hernandez were able to prove his allegations. 487 F.2d at 383.

Appellants here argue that state action was found *sub silentio* by the *Hernandez* court, and point out that the plaintiff in that case briefed the point on appeal. While

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owner's consent. *See Paton* v. *Robinson*, 81 Conn. 547, 554, 71 A. 730 (1909).

410 F. Supp. at 42.

18 Judge Smith may have qualified this conclusion somewhat when he observed later in his opinion:

> Thus, even if, when considered by itself, the implementation of the lien provisions did not result in "state action", it would still be infected by the "state action" resulting from the implementation of §14-150's towing provision.

410 F. Supp. at 43.

such a *sub silentio* jurisdictional ruling is not binding precedent in this court, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), we note Chief Judge Kaufman's dissent in *Shirley* v. *State National Bank of Connecticut, supra*, at 745-47, particularly his statement that the garageman's right of sale at issue in *Hernandez* did not exist at common law. *See also Sharrock* v. *Dell Buick-Cadillac, Inc., supra.*

We recognize that our holding that the enforcement of the warehouseman's lien pursuant to §7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in *Melara* v. *Kennedy, supra.* We have given that case due consideration, but we disagree with its conclusion and are unpersuaded by its analysis.

The case is reversed and remanded to the district court. On remand, the first question to be resolved is that of class determination,[19] because that may have an important bearing on the resolution of due process claims. Since the named plaintiffs in this case were consumers who stored personal belongings with Flagg Brothers and not merchants, the only constitutional challenge they can make individually is to §7-210(2), which authorizes enforcement of the warehouseman's lien upon goods "other than goods stored by a merchant in the course of his business." §7-210(1) is an entirely distinct provision which authorizes enforcement of the warehouseman's lien in the typical commercial warehousing situation, and defendant trade associations have raised a serious argument that a summary sale provision in this context may be constitutionally unobjectionable. *See D. H. Overmeyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972). The constitutionality of §7-210(1) will not be before the court, however, unless commercial warehouses

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19 Leave is hereby granted for substitution of Jones' personal representative as plaintiff pursuant to Fed. R. Civ. P. 25(a). *See* n.7, *supra.*

are determined to be within a defendant class against which suit is brought by an appropriate class of plaintiffs.

Reversed and remanded.

HOLDEN, *District Judge*, dissenting:

I respectfully dissent. I am persuaded, as Judge Werker was, that his court was without jurisdiction and would affirm the dismissal of the action.

The unfortunate plight which confronted the plaintiff Brooks, following her eviction in June 1973, inspires concern. And Mrs. Jones was similarly situated when she was evicted in November of the same year. According to the complaints they were victimized by the overbearing of the defendant warehouseman. But on the facts alleged the State of New York was not a participant in the action taken by the defendant Flagg.

The defendant retained the bailed property under an ancient possessory lien conferred by the common law.[1] *See Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y.Sup. Ct. 1832); *cf. Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-645 (1900). *See also* R. Whitaker, A Treatise of the Law Relative to the Rights of Lien and Stoppage in Transitu 13-14 (1816). While the complaints speak of threats of sale, that drastic remedy was not applied; the property has been returned to both plaintiffs.[2]

The power of sale asserted by the defendant was first conferred on warehousemen by an enactment of the New

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1 The common law remedy in New York gave the warehouseman a possessory lien on the stored goods until the storage charges were paid.

2 After the action was brought, by agreement of counsel, the plaintiff Brooks removed her goods without paying the storage charges. The plaintiff Jones' storage charges were paid with protest against the amount of the charges and the goods were removed.

York Legislature in 1879. Ch. 336 [1879] N.Y. Laws 417. Thus, for nearly a century warehousemen in New York have had the authority to sell goods stored with them to satisfy delinquent charges. The majority of the court concludes that the "statutory delegation of government power and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action." According to the majority, that thrust is sufficient to generate the judicial power to uproot a statutory provision that has governed the rights and remedies between warehousemen and their bailors for many years without interdiction by the courts of New York.

I agree that the question to be searched is whether the State of New York has become so involved in the retention and threatened sale of the plaintiff's goods that defendant's action "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co., supra* at 351. Without such participation the Fourteenth Amendment affords no protection. *Id.*

Of course a state can act only by way of its legislative, executive and judicial branches. *Ex parte Virginia*, 100 U.S. 339, 347 (1880). Here there is no suggestion of state participation by judicial action. To the contrary, it is the want of judicial action that is the predicate of the complaint. And the State's executive officers were not participants in either the creation of the lien or the threat to enforce it. The State quit the arena when the evictions were accomplished, before the present controversy began. The only state involvement is through the action of the legislature in adopting the challenged provisions of the Uniform Commercial Code § 7-210.

The question, as I perceive it, is whether the remedies provided by §§ 7-209 and 7-210 of the New York Uniform Commercial Code are "commanded" by the State, or "so

entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

The roots of the present controversy are embedded in private dealings between the warehouseman and the bailors of the property that was stored in the warehouse facility. No state agency or official has intervened to sell or threaten to sell the property entrusted by the plaintiffs to the defendant warehouseman. As to non-commercial storage, such as here involved, the Uniform Commercial Code merely retained the detailed provisions for notice, publication and public sale found in Section 33 of the Uniform Warehouse Receipts Act. Uniform Commercial Code § 7-210, Official Comment 1.

In *Shirley* v. *State National Bank*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974), the court was concerned with state action in the context of the Connecticut Retail Installment Sales Financing Act. Writing for the majority, Judge Mulligan pointed out:

> Here the right to private repossession always existed. Codification did not encourage the practice one whit. As we have pointed out, the legislation made it less attractive by providing greater safeguards to the consumer in the conditional sales contract.

Id. at 744.

By the law of New York the enforcement of a warehousman's lien, for nearly a hundred years, has not been the function of the sheriff. As will be seen from what is written in the margin, the historical background of the challenged statute tells us that the State of New York has not been significantly involved in the enforcement of the warehouseman's lien since 1879 unless, of course, either

the bailor or bailee elected to resort to judicial action. And the statute makes no "command" that §§ 7-209 and 7-210 shall be pursued as the warehouseman's exclusive remedy. *Compare Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963). The statutory history of the contested provisions of the New York Uniform Commercial Code indicates that there has been an accretion of safeguards to the mutual benefit of the parties to the bailment. *Cf. Bond* v. *Dentzer*, 494 F.2d 302, 307-09 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974); *Shirley* v. *State National Bank, supra*, 493 F.2d at 742.

Resolution of the question of government action "hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." *Wahba* v. *New York University*, 492 F.2d 96, 102 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Friendly, The Dartmouth College Case and the Public-Private Penumbra (1969).

Here we are not confronted with offensive discriminatory conduct by a private entity. There is nothing mandatory about the challenged statute; the State is neutral. The facts of the present controversy fail to establish involvement by the State of New York sufficient to constitute state action. *Bond* v. *Dentzer, supra. See Shirley* v. *State National Bank, supra*, 493 F.2d at 744.

Unlike the majority, I am persuaded that the adoption of § 7-210 of the New York Commercial Code does not constitute state action. The reasoning pursued in *Melara* v. *Kennedy*, 541 F.2d 802 (9th Cir. 1976) on the very question presented here, appears to me to be sound. *See also Smith* v. *Bekins Moving & Storage Co.*, 384 F.Supp. 1261 (E.D. Pa. 1974).

As we have seen, New York Uniform Commercial Code §§ 7-209 and 7-210 afford a choice of remedies to both bailor and bailee. The defendant warehouseman's exercise, or threatened exercise, of the power of sale allowed by the Code, "where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 357.

Absent the jurisdictional requisite of state action, I would affirm the order of the District Court without reaching the due process claim.

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants.

73 Civ. 4050 (HFW)

HENRY F. WERKER, D.J.

Plaintiffs Brooks and Jones are residents of Westchester County whose property was stored by defendant Flagg Brothers, Inc. following their evictions by the Mount Vernon Marshal in 1973.[1] On their own behalf and that of a proposed class of "persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code § 209 and subject to sale pursuant to New York Uniform Commercial Code § 210 because of warehouse fees allegedly due,"[2] they

challenge the constitutionality of those two statutes pursuant to 42 U.S.C. § 1983.[3] They allege deprivation of due process guaranteed by the Fourteenth Amendment of the United States Constitution, and seek declaratory and injunctive relief as well as money damages. Their proposed class of defendants includes "all . . . warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§ 209-210 without affording the owner of the goods a prior opportunity to be heard."[4]

Section 7-209 grants a warehousemen a lien on goods stored, and/or transported, for fees allegedly owed by the customer.[5] Section 7-210 gives a warehouseman the authority to enforce such a lien by public or private sale upon proper notification to the customer and adherence to commercially reasonable sale procedures.[6]

Plaintiffs have moved for class action certification of both a plaintiff and a defendant class, and for summary judgment on the question of the statutes' constitutionality. Defendants have cross-moved to dismiss for failure to state a cause of action and for lack of subject matter jurisdiction on the ground that the challenged conduct does not constitute state action within the meaning of the Fourteenth Amendment, and was not performed "under color of" state law within the meaning of § 1983.[7] Upon careful consideration of the facts in this case and the following analysis of relevant Second Circuit and Supreme Court decisions, the court finds that defendants are indeed correct. Plaintiffs' action is consequently dismissed for lack of jurisdiction.

Plaintiffs have advanced four arguments in support of their assertion that state action is present in the challenged activity. Their first argument is that the Second Circuit's decision in *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973) compels a finding of state action in this case. State

action, however, was never discussed in that opinion. In *Hernandez* plaintiff challenged the garageman's lien provisions of the New York Lien Law which allow a garageman to detain an automobile until alleged storage and repair charges are paid, and to foreclose his lien by selling the auto upon proper notification to the bailor.[8] The district court judge dismissed the complaint, noting:

> "[E]ven assuming that the defendants are acting under color of state law, the court cannot find that the plaintiffs' constitutional right to due process of law has been deprived by the operation of the challenged provisions of the lien law. Consequently, . . . the court need not go further and formally pass upon the second requirement — the presence of state action."

346 F. Supp. 313, 317 (E.D.N.Y. 1972).[9] On appeal the Second Circuit upheld the dismissal as to the detention provisions of the New York Lien Law because it found that having voluntarily delivered his car to the defendant garageman, and having never requested its return or tendered reasonable storage charges, the plaintiff had no standing to challenge the lien. 487 F.2d at 380. As to the sale provisions of the statute, however, the court noted that if, upon remand, the district judge were to find plaintiff's version of the facts as alleged,

> "then we would conclude that plaintiff has, under the doctrines enunciated in *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, a tenable contention that Section 204 of the New York Lien Law as applied here was repugnant to the due process clause of the Fourteenth Amendment. . . ."

Id. at 380-81. Neither the court's opinion nor the concurring opinion[10] in *Hernandez* mentioned or discussed the issue of state action.

Plaintiffs argue that a "finding" of state action is implicit in both *Hernandez* opinions. However, because District Judge Costantino had merely assumed the presence of state action in order to consider and dismiss the Hernandez constitutional claim on its merits, the state action issue was not properly before the Court of Appeals; the sole issue on appeal was whether, assuming state action, plaintiff had stated a claim. Furthermore, even if a finding of state action were implicit in the Second Circuit's decision, this court would not be bound by such a *sub silentio* ruling. *United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 38 (1952). This court therefore concludes that the Second Circuit's decision in *Hernandez* is not dispositive of the state action issue in this case.

Plaintiffs, in their remaining argument, would have the court find state action because:

> - the warehouseman who enforces his own lien pursuant to § 7-210 is performing what has traditionally been a public function;
>
> - the state imposes extensive regulation on the warehousing industry, including regulation of the challenged activity; and
>
> - section 7-210 confers on warehousemen rights in excess of those at common law.

The question of whether state action exists usually arises with respect to private conduct upon an allegation that the conduct is "so entwined with governmental policies or so impregnated with a governmental character as to become suject

to the . . . limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966). However, as the Supreme Court noted in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 172 (1972), "while the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer." The answers, particularly in recent months, have varied from circuit to circuit, and even within the Second Circuit have produced division and disagreement among panels.[11]

In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975), Judge Smith enumerated five factors culled from a review of state action case law which the court found to be "particularly important to a determination of state action":[12]

> (1) the degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme;(3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms.

Each of these factors is material; *no one factor is conclusive.*

* * *

> Moreover, even if one of these factors is absent, a finding of state action may still be appropriate.

Id. at 629-34 (emphasis added). Plaintiffs' second argument for state action, that in enforcing his own lien a warehouseman is performing a public function, finds support in Judge Smith's list above. Their rationale is that at common law a warehouseman could enforce his lien only by obtaining a court judgment and having the sheriff execute on it; thus, by allowing a warehouseman to enforce his lien without resort to the courts and the sheriff, § 7-210 enables him to perform an "inherently" public function. Plaintiffs rely for this theory upon *Blye v. Globe-Wernicke Realty Co.,* 33 N.Y.2d 15, 20 (1973) in which the New York Court of Appeals found that an innkeeper's execution of his own lien amounts to the exercise of a public function: "[T]he execution of a lien, be it a conventional security interest, (cite), a writ of attachment (cite), or a judgment lien (cite), traditionally has been the function of the Sheriff."

The liens referred to by the Blye court, however, all involve satisfaction of a debt having no particular relation to the goods executed upon. While such liens historically belong to the sheriff for execution, execution on goods lawfully in a warehouseman's possession, to satisfy charges *arising out of such possession,* is not traditionally a function of the sheriff; traditionally the sheriff was called upon for execution on goods only after the warehouseman had obtained a judgment lien.[13] *Melara v. Kennedy,* 74 Civ. 1535, N.D. Cal., August 21, 1974. *Accord,* Collier, Procedural Due Process — Post Fuentes Constitutionality of Garageman's Liens, 54 B.U.L. Rev. 542, 554 (1974). This distinction mandates rejection of the public function theory.[14] *Cf. James v. Pinnex,* 495 F.2d 206, 208 (5th Cir. 1974); *Melara v. Kennedy, supra.* In *Melara,* a case substantially identical to the one at hand, the court held that enforcement of a lien pursuant to § 7210 of the California Uniform Commercial Code was not performance of a state or public function, and did

not constitute state action. *See also Parks v. Ford,* 72 Civ. 639, 73 Civ. 1699, E.D. Pa., December 11, 1974. (Pennsylvania's repairman's lien statutes do not so infuse private acts of detention and sale with state involvement as to render them state action).

Plaintiffs' third argument in support of state action relies upon the public function theory and must be rejected with it. They suggest that because "warehouses and warehousemen are affected with a public interest," state regulation of the industry permeates its nominally private acts with state action. This line of reasoning was effectively foreclosed by the Supreme Court in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974). In that case petitioner challenged the constitutionality of the defendant's authority, under a tariff filed with the State Public Utilities Commission, to cut off her electric power without meeting the due process standards enumerated in *Fuentes v. Shevin,* 407 U.S. 67 (1972). Justice Rehnquist, writing for the Court, stated:

> Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses 'affected with the public interest' are state actions in all their actions.
>
> We decline the invitation for reasons stated long ago in *Nebbia v. New York,* 291 U.S. 502 (1934), . . . :
>
> > It is clear that there is no closed case or category of businesses affected with a public interest. . . . The phrase 'affected with a public interest' can, in the nature

> of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . . In several of the decisions of this Court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been put forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.' *Id.*, at 536.

Id. at 353.

Plaintiffs seem to have anticipated such foreclosure, for they suggest in the alternative that even if the challenged activity is essentially private, state regulation of the industry is so directly and significantly involved therein that the state must be viewed as a joint participant. Under this rubric which tracks factor (2) in Judge Smith's list above, the state's "involvement" is its regulation of the warehouseman's lien sale and its failure to include in that pervasive regulation a requirement of *Fuentes* due process standards. This in essence is the theory first used by the Supreme Court in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).[15] *Burton,* however, is distinguishable in two important ways. First, in the instant case the symbiotic relationship between the state and the private defendant present in *Burton* is missing. Secondly, *Burton* was a case involving racial discrimination, and "racial discrimination is so peculiarly offensive and . . . so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts." *Coleman v. Wagner College,* 429 F.2d 1120, 1127 (2d Cir. 1970).[16] *See also Greco v. Orange Memorial Hospital Corp.,* 43 U.S.L.W. 2522-23 (5th Cir. 1975); *Adams v. So. Cal. First National Bank,* 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied,* 43 U.S.L.W. 3277 (1974). Thus resolution of the state action

issue in this, a non-racial case, is not controlled by the standards evolved in cases of racial discrimination.

Plaintiff's last argument, and by all appearances the sturdiest, is that by statutorily conferring on warehousemen a power not possessed at common law, the state has created an impetus for warehouseman lien sales, has encouraged such sales, and has thereby so involved itself in the challenged conduct as to transform it into state action.[17] (See factor (3) of Judge Smith's *Jackson v. Statler Foundation* list, *supra.*) The key to this argument is the alteration of common law, for the Second Circuit in recent decisions has held mere statutory codification of common law rights insufficient state involvement to constitute state action. *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974); *Shirley v. State National Bank,* 493 F.2d 739 (2d Cir. 1974). In *Shirley,* where plaintiff challenged repossession of goods purchased under an installment sales contract, the court stated:

> . . . since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action.

Id. at 743. Likewise, in *Bond,* the court found that state action was not present in an assignment of wages made pursuant to New York's wage assignment statute because "the statute has not given the assignee anything new." *Id.* at 311. *See also Phillips v. Money,* 503 F.2d 990 (7th Cir. 1974); *Fletcher v. Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir. 1974); *Parks v. Ford, supra* at 30-31; *Boland v. Essex County Bank and Trust Co.,*[18] 361 F. Supp. 917 (D. Mass. 1973).

The question remains whether satisfaction of this "common law codification or alteration" test alone constitutes state involvement significant enough to be called state action. Judge Smith in *Jackson v. Statler Foundation, supra,* warned that "no

one factor is conclusive." By definition, if the facts here do not meet the state action standards for cases of racial discrimination such as *Statler Foundation,* they do not meet the more exigent prerequisites to state action in non-racial cases. The Fifth and Ninth circuits, in the context of challenges to self-help repossession statutes, have both found the common law test, alone, to be insufficient. In *Adams v. So. Cal. First National Bank, supra,* the Ninth Circuit stated:

> [W]e do not consider it conclusive that section 9503 of the California Commercial Code confirmed what the law of California had theretofore been, *i.e.,* that a secured party upon default had a right to take possession of the collateral. This is not the final answer to the touchstone of state action. Were such a test the only one, the California statutes adopting the common law of England would cast the shadow of state action over all activity and pose an argument that could blanket all individual wrongs under section 1983.

492 F.2d at 330. The Fifth Circuit in *James Pinnex, supra,* noted:

> . . . the fact is that Mississippi cases did not sanction self-help repossession except when provided for in the parties' contract, whereas § 9-503 allows it except when the contract is silent on the point. Thus the creditor's arguments that § 9-503 merely carried forward the former Mississippi practice and that the contract is the sole source of summary repossession power, lose some force.

495 F.2d at 498. The court then went on to conclude, however, "No bright lines can be drawn in this area, and we draw none. Some state involvement . . . may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action."

Given the Second Circuit's discussions in *Shirley* and *Bond,* as well as relevant decisions from other courts, it seems clear to this court that with respect to those members of plaintiffs' "class" whose contracts contained a sale-in-case-of-default provision, there is no state action. See note 17 *supra.* As the Ninth Circuit noted in *Adams,* "the State cannot be held responsible for creating conditions that result in standardized contracts in the credit industry which typically provide for self-help repossession without notice or an opportunity for a hearing prior to the seizure of property." 492 F.2d at 333. See Note — State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col. L. Rev. 656 at 665 (1974). Indeed, one case which has dealt specifically with § 7-210 and a contractual provision for sale has so ruled. *Smith v. Bekins Moving and Storage Co.,* 384 F. Supp. 1261 (E.D. Pa. 1974). Furthermore, here as in *Shirley* and *Bond,* the codification and alteration of common law also impose certain procedural restraints on it, to the benefit of warehouse customers, *i.e.,* requirements as to fair notice, reasonable sale, etc., and thus, as in those cases, represent ameliatory rather than regressive action. "Private action does not become state action simply because government regulation has not gone so far as a plaintiff would like." *Jackson v. Statler Foundation, supra* at 639.

Likewise, with respect to those in plaintiffs' "class" who are subject to no contractual provision of sale, the court also fails to find sufficient state involvement to constitute state action. It is true that for this group of warehouse customers the defendants' power of sale comes only from § 7-210. However, in its decision in *Jackson v. Metropolitan Edison Co., supra,* the Supreme

Court stated: "Approval by a state utility commission . . . , where the Commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.'" *Id.* at 357 (emphasis added). In this case no less than in Jackson, the state's involvement in the challenged activity is merely permissive. For this reason, and for the reasons detailed above, the court must conclude that plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28 U.S.C. § 1343(3), or to state a claim under 42 U.S.C. § 1983. The action is therefore dismissed.

SO ORDERED.

Dated: New York, New York

July 7, 1975

U. S. D. J.

NOTES

1. For the allegations of these named plaintiffs see the decision on Jones' motion to intervene by the Honorable Murray Gurfein, then U.S.D.J., at 63 F.R.D. 409, 411-12 (S.D.N.Y. 1974).

2. Verified Complaint at 2.

3. Section 1983 reads:

   > Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

   Federal district courts have jurisdiction to hear actions under § 1983 by virtue of 28 U.S.C. § 1343 (3).

4. Verified Complaint at 3.

5. Prior to codification by the U.C.C. and its predecessors, such a lien existed at common law. R. Brown, The Law of Personal Property § 119 (2d ed. 1955).

6. Such a right of enforcement did not exist in New York at common law, although it has existed in statutory form since 1879. See note 17, *infra.*

7. The "state action" and "action under color of state law" concepts have been found to be functionally equivalent. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970). Hereinafter they shall be jointly referred to as "state action."

8. The statutes challenged in *Hernandez* are substantially similar to those in question here. *Compare,* New York Lien Law §§ 184, 201, 202 and 204 with New York U.C.C. §§ 7-209, and 210.

9. In a footnote, however, Judge Costantino noted that the presence of state action "would seem to be quite manifest." "Though he is a private individual, the lienor through the public auctioneer it has retained, is performing a traditionally public function pursuant to a right accorded it by a state statute." 346 F. Supp. 313 at 317.

10. Judges Timbers and Lumbard, in a concurring opinion, went further than Judge Wyzanski in the court's opinion, stating that they would direct the district court to declare the sale provisions unconstitutional as applied if plaintiff were to prove his allegations.

11. In *Tucker v. Maher,* 497 F. 2d 1309 (2d Cir. 1974) Judge Mulligan noted:

> Constitutional law, particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. The very recent history of such constitutional litigation in this circuit should convincingly indicate that the role of the prophet is precarious at best.

In a footnote he then added:

> In *Shirley v. State Nat'l Bank,* 493 F.2d 739 (2d Cir. 1974), and *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974), after both panels had split 2-1 over state action issues, rehearings en banc were denied . . . by votes of 5-3. In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), again a state action case, a rehearing en banc was also denied by a failure of a majority of the active judges to vote in favor of such reconsideration; the vote was 4-4, 496 F.2d at 636.

Id. at 1315.

12. Although the *Jackson v. Statler Foundation* factors were enumerated in the context of an action against charitable foundations for alleged racial discrimination, and the courts have traditionally used a lesser state action standard where race is concerned (see page 9, *infra*), they are helpful in delimiting the outer boundaries of state action prerequisites. The court in *Statler Foundation* found that if the defendant institutions were substantially dependent upon their tax-exempt status, if the government's regulatory scheme was both detailed and intrusive, if the scheme carried connotations of government approval, if the institutions did not have a substantial constitutional claim to be left alone, and if they served some public function *then* the district court on remand could find state action.

13. Ever since its statutory creation in 1879 (L. 1879 c. 336), the warehouseman's lien has traditionally been enforced by warehousemen themselves.

14. Even if this court were to conclude, however, that enforcement of a lien pursuant to § 7-210 constitutes execution of a public function, this conclusion would not lead inexorably to a finding of state action. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974); *Powe v. Miles,* 407 F.2d 73, 80 (2d Cir. 1968).

15. In *Jackson v. Metropolitan Edison Co., supra,* the Supreme Court described the Burton case as follows:

> . . . where a private lessee who practiced racial discrimination leased space for a restaurant from a state parking authority in a publicly owned building the Court held that the State had so far insinuated

itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise. *Id.* at 725. We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. 419 U.S. at 357-58.

16. Our circuit has long recognized a double 'state action' standard, a less onerous test for cases involving racial discrimination, and a more riguous standard for other claims. *See United States v. Wiseman,* 445 F.2d 792, 795 at n.3 (2d Cir. 1971).

17. The statutory right to enforce the w[illegible]useman's lien, first enacted in 1879, was reenacted as [illegible] of the New York General Business Law in 1907. L. 1907, c. 732 § 33, as amended L. 1949, c. 588. In 1962 the state legislature again reenacted it, this time as part of the U.C.C., effective since 1964. The state courts have traditionally considered these statutory provisions to be in derogation of common law. *See, e.g.: Maritime World Corp. v. Grefe Steel Warehouse Corp.,* 154 N.Y.S. 2d 684 (S. Ct. N.Y. Cnty 1956); *Hackett v. Nelson Express & Storage Co.,* 294 N.Y.S. 905 (S. Ct. N.Y. Cnty 1937). To the extent, however, that contractual provisions between warehousemen and customers allowing for sale in case of default have been enforced by the courts, sale provisions of contractual origin can be said to be part of the state's common law. *Cf.* note 18, *infra.* A majority of warehouseman contracts in New York apparently contain such provisions.

18. In *Boland,* the court examined the constitutional validity of the Massachusetts self-help repossession statute. It found that at common law repossession was allowed *only if*

provided for by contract, whereas the statute in question allowed repossession *unless* it was *prohibited* by contract. In dicta the court asserted that the same differences had existed in *Shirley v. State National Bank, supra,* between the common and statutory law of Connecticut, adding: ". . . there is no indication in the [Second Circuit] court's ruling in *Shirley v. State National Bank* that the parties undertook to demonstrate to the court the changes in the law of Connecticut brought about by its enactment of the U.C.C." *Id.* at 921. The *Boland* court found that state action existed.

19. The court notes that a challenge to §§ 7-209 and 7-210 has already been mounted in the state courts. In *Jones v. Banner Moving and Storage Inc.,* 358 N.Y.S.2d 885 (Kings Cnty 1974), the New York Supreme Court found those statutes to be unconstitutional for essentially the same reasons plaintiffs would present here. That decision has been argued on appeal to the Appellate Division, 2d Dept., and is now *sub judice.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, amend. XIV, §1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.Y.U.C.C. 7-210:

"*Enforcement of Warehouseman's Lien*

* * *

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that

time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale."

42 U.S.C. §1983:

"*Civil Action for Deprivation of Rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §1343:

"*Civil Rights and Elective Franchise.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."